In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 586

OLIN INDUSTRIES, INC., WINCHESTER REPEATING ARMS COMPANY DIVISION, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The original opinion of the court below (R. 340-349) is reported at 191 F. 2d 613 and the opinion denying rehearing (R. 379-381) at 192 F. 2d 799. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 143-159, 160-314), are reported at 86 NLRB 203.

JURISDICTION

The judgment of the court below was entered on August 7, 1951 (R. 349). Petition for rehearing was denied on November 30, 1951 (R. 381), and application for leave to file a second petition for rehearing and to adduce additional evidence was denied on January 14, 1952 (R. 403). The petition for a writ of certiorari was filed on February 14, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and under Section 10 (e) and (f) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the original National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151 *et seq.*), and of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 151, *et seq.*), are set forth in the Appendix, *infra,* pp. 23-30.

QUESTIONS PRESENTED

1. The first question posed by the petition—whether the charges were filed by a person acting as a "front" for a union not itself authorized to file—is not properly presented here.[1]

---

[1] This matter was never put in issue before the court below; it was mentioned for the first time in petitioner's unsuccessful application for leave to file a second petition for rehearing. Assuming that the question is properly raised here, it goes only to a matter of substantial evidence. See pp. 13-14, *infra.*

2. Whether substantial evidence supports the Board's findings that petitioner, in violation of Section 8 (3) and (1) of the original Act, locked out, discharged, and refused to reinstate various employees in reprisal for their engaging in concerted activities protected by the Act.

3. Whether the Board's procedure was valid and proper.

a. Whether the Board, more than six months after the effective date of the amended Act, could properly issue a complaint based upon charges filed and served by ordinary mail before the effective date of that Act.

b. Whether such a complaint, which alleged that 85 named strikers had been denied reinstatement, could properly be amended at the hearing to add to the list of those denied reinstatement two more who participated in the mass application for reinstatement but were not named in the charge.

c. Whether the Board could properly find that petitioner illegally locked out its employees where the lock-out, although not alleged in the complaint, was an integral part of the course of unfair labor practices therein alleged, and where the facts relating to the lock-out were fully litigated at the hearing.

STATEMENT

A. The unfair labor practices as found by the Board

Upon the usual proceedings under Section 10 of the National Labor Relations Act, as amended, the Board, on September 29, 1949, issued its findings of fact, conclusions of law, and order. The pertinent facts, as found by the Board, may be summarized as follows:

In April 1946,[2] petitioner instituted changes in the working hours and overtime pay of its rolling mill employees, who protested without success (R. 204, 206-207; B. A. 121-128, 143-146, 160-163).[3] Apparently believing that the Union[4] was responsible for the employees' discontent, petitioner began a campaign to intimidate the employees by threatening discharge if they should join the Union or engage in a strike and by interrogating them regarding union activities (R. 261-276; B. A. 75-76, 85-87, 105-106, 118, 190-191, 195, 205-206, 223-228, 296-299, 304-305). About September 20, 1946, employees of all three shifts of the rolling mill met and formulated demands to be presented

---

[2] In 1942, petitioner discharged three employees. Petitioner has not requested this Court to review the findings of the Board and the court below that these discharges were unlawful.

[3] The symbol "R" refers to the transcript of record; the symbol "B.A." refers to the appendix to the brief filed by the Board in the court below.

[4] United Electrical, Radio & Machine Workers of America, CIO.

to petitioner through committees appointed to represent each shift. The employees resolved to hold a 15 minute work stoppage the following day on each of the three shifts, immediately following their respective 15 minute lunch periods, at which time each committee was to present written grievances to petitioner (R. 211-213; B. A. 7-8, 56-58, 131-134, 148-150).

In accordance with this plan, the first shift employees, with the exception of the few workers required to continue working to prevent damage, did not immediately return to work when their lunch period ended at 12:15 p. m. on Saturday, September 21, 1946, but instead assembled in the washroom. Works Manager Boak, however, refused to accept or discuss the written grievances which the first shift committeemen, Destadio, Fred Baldino, and Bonito, attempted to present, and ordered all the employees back to work. The plant guards were called but no violence ensued, and a few minutes later, at the suggestion of Destadio, the men resumed their work (R. 213-216; B. A. 134-136, 140-141, 152-154, 252-253). Several hours later, Destadio, Baldino and Bonito were summoned to Manager Boak's office and summarily discharged on the ground that they had instigated the work stoppage which Boak characterized as an illegal strike (R. 217-220; B. A. 138-140, 155-157).

On learning of the three discharges, the second shift employees decided to request reinstatement

of the three discharged employees in addition to presenting their other grievances (R. 220; B. A. 61-62). As in the case of the first shift, the employees on the second shift did not return to work at the end of their lunch period at 7:15 p.m., and attempted to present their grievances to Manager Boak, who refused to accept them, ordered the men back to work, and again called for the guards. The men then retired to the washroom (R. 221-222; B. A. 62, 65-66, 91-92, 164-167). Boak later called Proto, Weaver and Morton, three of the committeemen for the second shift, to his office, but they refused to go, fearing discharge. He then sought to ascertain the names of the employees who had engaged in the work stoppage (R. 222; B. A. 67-68, 93, 167). At about 9:30 p.m., the men were ordered to leave the plant because the mill was to be shut down. The men, however, refused to leave prior to the end of their shift at 11:00 p.m., because they had been advised earlier in the week by company officials that anyone who failed to work on Saturday or Sunday would be discharged (R. 223; B. A. 68-70, 81-83, 167-168, 228-229). They remained in the washroom and performed no work until the end of their shift, when they left the plant without disturbance (R. 223-224; B. A. 70-71, 95-96, 168).

When the employees on the third shift reported for work at 11:00 p.m., they found that the usual number of plant guards at the gates had been in-

creased, that the rolling mill had been shut down, and that they were not permitted to enter. Limited operation of the rolling mill was resumed the following day, September 22, but only a few employees selected by company officials were admitted to work, and they were given new passes to distinguish them from the other employees (R. 225-226; B. A. 71-73, 83-84, 170-171, 210-211, 247-249, 251-252, 255-256, 518). Those who were locked out thereupon staged a parade and began to picket the plant (R. 231; B. A. 74, 157-158).

On September 24, 1946, petitioner sent letters inviting the strikers to return to work. Such letters, however, were not sent to Destadio, Fred Baldino, Bonito, or to eight employees who, with one exception, were members of the three shift committees (R. 12, 229-230; B. A. 57-58, 141, 149-150, 175, 184, 214, 229, 286, 311, 519-520). Two of the eight, Louis Baldino and Ballard, had not participated in the work stoppage.[5] Petitioner discharged the eight employees together with five others,[6] and admitted at the hearing that membership on the shift committees might "very possibly" have been the cause for the discharge of the committeemen (R. 237-239; B. A. 501-502, 522-525, 534). On Sep-

---

[5] Baldino was on the third shift which was locked out (B. A. 209), and Ballard, on the second shift, had remained on duty in order to prevent damage to machinery (B. A. 91-92, 282, 285).

[6] The five were Beal, Giannelli, Johnson, Tardie, and Wayert.

tember 27, 1946, at a meeting between representatives of petitioner, the Union and the rolling mill employees, attended by federal and state mediators, petitioner offered to reinstate the employees except Destadio, Fred Baldino and Bonito, but the Union refused to accept this condition (R. 231-232; B. A. 10-11, 177-178, 211-214, 414-415).

On October 20, 1946, the unfair labor practice strikers who had not abandoned the strike decided to withdraw their picket lines and to apply for reinstatement the following day (R. 232; B. A. 77-78, 182). Accordingly, no picketing took place on October 21, and all the strikers assembled at petitioner's personnel office early that morning ready and willing to return to work (R. 232; B. A. 13-14, 78, 113, 172-173, 182, 201, 233-234, 288, 307, 314, 328-329, 390, 402, 486-487). Petitioner, however, rehired only between 75 and 100 employees and treated them as new, rather than reinstated, employees (R. 232-233, 244; B. A. 291-294, 350-351, 487-488). The remaining applicants, after waiting two days in line for reinstatement, concluded that their applications were unsuccessful and left to resume picketing (R. 233; B. A. 16-17, 201-203, 215-216).

Upon these facts the Board found that petitioner, in violation of Section 8 (1) of the Act, interfered with, restrained and coerced its employees (R. 151-152, 283-284), and that petitioner, in violation of Section 8 (3) and (1) of the Act, discrimi-

natorily discharged 16 employees (R. 147, 249-250, 253-254, 256-257, 284-285), locked out 78 other employees from September 21 to 29, 1946 (R. 148, 228, 254, 256-257), and refused to reinstate the 78 and 9 other employees upon their application for reinstatement on October 21, 1946 (R. 149, 254-256, 258). The Board accordingly ordered petitioner to cease and desist from the unfair labor practices found and to reinstate with back pay the employees who were unlawfully discriminated against (R. 153-159).

B. Proceedings before the Board

1. The procedural steps

In 1946, prior to the enactment of the amended Act, charges respecting the discharges of Mumford, Bucci and Gordon, employees as to whom petitioner seeks no review,[7] were executed by the Union and filed by Marvin C. Gold, an attorney-at-law representing these three employees (B. A. 435-439). Sometime after June 1946, the Union executed and filed amended charges which repeated the allegations of the original charges and also complained of petitioner's 1946 unfair labor practices, described above (R. 169-170; B. A. 439-440). In July 1947, however, the Union requested permission to withdraw the charges (R. 170; B. A. 440). Gold, who was not attorney for the Union and was never retained by it, opposed the Union's

[7] See note 2, *supra*.

withdrawal of the charges and, at his request, the dismissal of the charges was made without prejudice (R. 170; B. A. 437, 441, 452-453). Thereafter, beginning on July 30, 1947, Gold executed and filed a series of charges, culminating with the third amended charge filed on August 18, 1947, which alleged the 1946 violations discussed above (R. 23, 26, 30, 35).[8] Copies of these charges were served on petitioner by ordinary mail on August 18, 1947, four days before the effective date of the amended Act (R. 144-145, 161; 134-142).[9]

---

[8] In its exceptions to the trial examiner's report petitioner urged as error the trial examiner's failure to dismiss the complaint on the ground that Gold was a "front" for the Union. Petitioner there alleged that it was at the Union's instigation that Gold sought and obtained from the employees authorization to represent them as individuals, and that Gold's interest in the charges was "purely monetary" (R. 99-100). Following the Board's rejection of this exception petitioner abandoned its claim that Gold was a "front" for the Union, and only sought to resurrect it in its application for leave to file a second petition for rehearing in the court below (R. 388).

[9] At the commencement of the hearing before the trial examiner, petitioner objected to the introduction of the charges into the record, insisting that it had never been served with such charges. Counsel for the General Counsel thereupon showed petitioner's counsel carbon copies of letters transmitting the charges (R. 160). Counsel for the General Counsel apparently understood that petitioner's counsel had tacitly admitted service of the charges and accordingly did not seek to introduce further proof of service into the record (R. 81).

In its exceptions to the intermediate report, however, petitioner contended that it was not served with copies of the charges until service of the complaint on April 8, 1948. Ac-

The complaint, issued April 8, 1948, alleged *inter alia* a refusal to reinstate 85 named unfair labor practice strikers who participated in the unsuccessful mass application for reinstatement (R. 161, 163, 39; B. A. 4-7). At the commencement of the hearing before the trial examiner, the complaint was amended over petitioner's objection so as to add two more names to the list of 85 (R. 163; B. A. 3-4).

2. The Board's rejection of petitioner's procedural objections

The Board rejected petitioner's contention that Gold, the charging party, was acting not on behalf of the individual discriminatees, but as a "front" for a union which had not complied with the affidavit-filing requirements of Section 9 (h) (R. 143-144, n. 2). See note 1, p. 2, *supra*. The Board also held, upon the facts set forth above, that the charges were filed and served prior to the effective

---

cordingly, counsel for the General Counsel "in the interest of clarifying any possible ambiguity with respect to fulfillment of the procedural administrative requirements of the Act," moved to reopen the record for introduction therein of proof of service of the charges (R. 79-81). On March 16, 1949, the Board served upon petitioner a Notice to Show Cause, together with copies of the aforesaid letters and an affidavit that they were mailed to petitioner, on and before August 18, 1947. The Notice to Show Cause stated that unless sufficient cause to the contrary was shown by March 28, 1949, the aforesaid proof of service of the charges would be made a part of the record (R. 134-141). Petitioner filed no response to this Notice, and on April 11, 1949, the Board issued its order incorporating such proof of service into the record (R. 142).

date of the amended Act, and that the complaint was therefore not barred by the time limitation which Section 10 (b) of the amended Act imposed on the filing and service of charges (R. 144-145, 162-163). The Board upheld the action of the trial examiner in permitting the amendment of the complaint at the hearing to add two discriminatees, similarly situated to the 85 already named as having been denied reinstatement (R. 144, n. 3, 163). Finally, the Board upheld the trial examiner's finding of an illegal lockout, over petitioner's objection that no lockout was alleged in the charges or complaint. The Board noted, "The issues with respect to the lockout were fully litigated at the hearing, and an opportunity was afforded the [Company] to adduce testimony to refute the charge that it locked out the employees in question" (R. 148, n. 10).

C. The decision of the court below

The Court of Appeals for the Fifth Circuit held that the evidence on the record considered as a whole sustained the findings of the Board (R. 345). The court held further that since the charges were filed and served prior to the effective date of the amended Act, they were not subject to the limitation period therein provided (R. 346). Upon application for rehearing the court in a further opinion rejected the Company's contention that the charges were defective because served by ordinary, rather than by registered, mail (R. 379-380). The

court did not pass upon the question whether Gold, the charging party, was a "front" for the non-complying union, as this issue was not presented below until the application for leave to file a second petition for rehearing, which was denied (R. 387-388, 403).

ARGUMENT

1. Since petitioner abandoned before the court below its contention that on the factual allegations referred to in petitioner's exceptions (R. 99-100) Gold should have been found by the Board to have been acting as a "front" for a non-complying union, that question is not appropriate for consideration here. *McCullough* v. *Kammerer Corp.*, 323 U. S. 327, 328. In any event, petitioner's own allegation that Gold solicited and obtained the authorization of the individual employees shows that Gold became their agent, and not the agent of the Union. That Gold may have undertaken to represent the employees at the instance of the Union is immaterial; petitioner itself alleged that "Gold made dealings with these individuals as to his fee based upon what they might ultimately recover in back-pay awards * * * [and] his interest in the proceedings was purely monetary" (R. 99-100). It is settled that circumstances such as these do not warrant an inference of "fronting." *National Labor Relations Board* v. *Clausen*, 188 F. 2d 439, 443 (C. A. 3), certiorari denied, 342 U. S. 868; *National Labor Relations Board* v. *Augusta Chemical Co.*, 187 F. 2d 63, 64 (C. A. 5); *Southern Fur-*

niture Mfg. Co. v. *National Labor Relations Board,* 29 LRRM 2392, 2393 (C. A. 5, January 31, 1952); *National Labor Relations Board* v. *Alside, Inc.,* 192 F. 2d 678, 679 (C. A. 6).

Petitioner's claim of conflict with the *Alside* decision, *supra,* is without substance; that case turned on its own facts—the charge was filed by a union president, on behalf of all union members, under circumstances which led the court to find that he was acting in his capacity as president of the union. See *Southern Furniture Co., supra,* distinguishing the *Alside* decision on factual grounds. Since petitioner's allegations do not warrant an inference that Gold was "fronting" there is no basis for petitioner's assertion that its contention poses any "jurisdictional" issue. Cf. Brief for the National Labor Relations Board in Opposition, pp. 10-13, *Red Rock Co.* v. *National Labor Relations Board,* No. 695, October Term, 1950, certiorari denied, 341 U. S. 950; *Ann Arbor Press, Inc.* v. *National Labor Relations Board,* No. 260, this Term, certiorari denied, 342 U. S. 859. Petitioner's failure to preserve its objection in the court below thus precludes its consideration by this Court.

2. The other questions of fact raised by the petition (Pet., p. 4) are peculiar to the record in this case, and consequently do not warrant review by this Court. *General Pictures Co.* v. *Electric Co.,* 304 U. S. 175-178. Moreover, the findings of the trial examiner and the Board, approved by the

court below, are amply supported by the record.[10]

3. The question whether the employees engaged in misconduct which would have justified their discharge, lockout, or non-reinstatement need not be reached on this record which supports the Board's finding, affirmed by the court below (R. 253, 345), that petitioner's reprisals were in fact motivated by its anti-union animus rather than by any alleged illegal conduct of the employees.[11] In any event, as both the Board and the court below properly held, the employees' conduct was not illegal (R. 148, 252-253, 346).

The holding that the employees who prolonged their meal period 15 minutes for the purpose of presenting grievances to their employer were engaged in protected concerted activity is clearly cor-

---

[10] With respect to the mailing of the charge, see R. 135-142, 144-145, 379. With respect to the applications for reinstatement, see R. 149, 232, 255, 345, 348-349, 380-381; B. A. 77-78, 113, 173, 182, 201, 233-234, 288, 307, 314, 328-329, 390, 402, 486-487.

[11] See, for example, the cases of Louis Baldino and Ballard, who were discharged although neither participated in the allegedly illegal work stoppage (see note 5, *supra*). Compare the admission of Superintendent Willers that *membership* on the shift committees might have been cause for the discharge of the committeemen (p. 7, *supra*). Also significant in this context is the fact that of the several hundred employees who participated in the allegedly illegal action, petitioner discharged only the union members and others who presented the grievances. Cf. *National Labor Relations Board* v. *American Manufacturing Co.*, 106 F. 2d 61, 67-68 (C. A. 2), affirmed, 309 U. S. 629.

rect and accords with the holdings of other Courts of Appeals. *National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817, 819 (C. A. 3); *National Labor Relations Board* v. *National New York Packing & Shipping Co.*, 86 F. 2d 98 (C. A. 2), enforcing, per curiam, 1 NLRB 1009; *Gullett Gin Co.* v. *National Labor Relations Board*, 179 F. 2d 499, 501-502 (C. A. 5), reversed on another point, 340 U. S. 361. No conflict of decisions exists and, on this point, none is claimed.

Similarly, the somewhat longer, but equally peaceful and orderly, cessation of work by the employees on the second shift, occasioned in part by petitioner's unfair labor practice in discharging the committeemen from the first shift, and in part by the employees' belief that they were required to stay in the plant until the end of their scheduled shift (p. 6, *supra*), was properly held by the court below not to warrant denial to them of the protection of the Act. *National Labor Relations Board* v. *American Manufacturing Co.*, 106 F. 2d 61, 68 (C. A. 2), affirmed, 309 U. S. 629; cf. *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 816 (C. A. 7). This Court's decisions in *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, and *International Union, U. A. W.* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, relied on by petitioner, are inapposite, for this case involves neither a seizure of the plant and violent resistance to police

authorities attempting to compel obedience to an injunction (as in *Fansteel*), nor the adoption of a "quickie-strike" technique resulting in 26 work stoppages in which no demands were presented and which were designed to harass the employer and disable him "from making any dependable production plans or delivery commitments" (*Wisconsin* case, 336 U. S., at 249). On the contrary, the *Wisconsin* opinion supports the judgment below in this case, for the employees here sought to present specific grievances, and the work stoppage was "isolated," reflected a "temporary rebellion over rules or conditions of work," and took place "in a context of anti-union animus on the employer's part" (336 U. S., at 255-256).[12]

4. None of petitioner's contentions directed to the timeliness or sufficiency of the charge and com-

[12] Petitioner's lockout of its employees in retaliation for their attempt to present grievances plainly constituted "interference, restraint, and coercion," in violation of Section 8 (1) and discrimination in violation of Section 8 (3). Indeed, before the Board, petitioner made no attempt to defend the legality of the lockout, but argued solely that the charge and complaint failed to allege it (see *infra*, p. 21). Its belated reliance here on *C. G. Conn. Ltd.* v. *National Labor Relations Board*, 108 F. 2d 390, 397 (C. A. 7), and *Morand Brothers Beverage Co.* v. *National Labor Relations Board*, 190 F. 2d 576, 582 (C. A. 7), is misplaced. The instant case presents no attempt by the employees to dictate the hours at which they would work as in *Conn.* In *Morand* the court made it clear that a lockout was not a legitimate weapon when undertaken in reprisal or as a penalty for the exercise of rights protected by the Act (190 F. 2d, at 584).

plaint in this case presents any conflict of decisions or any important question warranting review.

a. Since the charges were filed and served prior to the effective date of the amended Act, they were not subject to the limitations period which Section 10 (b) of the amended Act placed upon the filing and serving of charges.[13] Contrary to petitioner's contention, *Superior Engraving Co.* v. *National Labor Relations Board,* 183 F. 2d 783 (C. A. 7), certiorari denied, 340 U. S. 930, does not conflict with the settled law on this point; it stands only for the proposition that "stale" charges not filed and served before the enactment of the amended Act must be filed prior to its effective date, rather than (as other courts have held) within six months thereafter. 183 F. 2d, at 789-790, esp. n. 2. Since the charges here were filed and served on August 18, 1947, four days prior to the effective date of the amended Act, the issue as to which the *Superior* case conflicts with the view of other courts is not presented on this record.

b. As noted above, pp. 14-15, n. 10, petitioner's attempt to show that the charges were not served raises only an evidentiary question, which does not warrant review, and which in any event was prop-

---

[13] The complaint issued under the amended Act, but the limitations period in that Act applies to the charge, not to the complaint. Section 10 (b). Congress rejected an amendment which would have limited the period in which a complaint could be issued. H. Conf. Rept. No. 510, 80th Cong., 1st Sess., p. 53.

erly decided adversely to petitioner. Petitioner's argument that the charges were served by ordinary, rather than by registered, mail was properly dismissed by the court below as raising "a mere technical defect in the service of a charge which is not a pleading" (R. 379).[14] As the court noted, quoting with approval from *Union Starch & Refining Co.* v. *National Labor Relations Board,* 186 F. 2d 1008, 1013 (C. A. 7), certiorari denied, 342 U. S. 815:

> . . . the Company * * * was [not] in any way misled or prejudiced by this procedure. * * * the error was harmless. It did not affect the substantial rights of the Company * * * and should therefore be disregarded.

Since petitioner entered an answer on the merits without attacking the manner of service, it waived its right to object thereto. *Harlan* v. *Sparks,* 125 F. 2d 502, 506 (C. A. 10); *Jackson* v. *Heiser,* 111 F. 2d 310, 313 (C. A. 9); see *Munter* v. *Weil Corset Co.,* 261 U. S. 276, 279. Moreover, the record leaves

---

[14] Such a defect is not comparable to a failure by the agency to make necessary findings required by statute as a condition precedent to its action, as in *Mahler* v. *Eby,* 264 U. S. 32, and *Wichita Railroad & Light Co.* v. *Public Utilities Commission of Kansas,* 260 U. S. 48, relied on by petitioner (Pet. 14). In *Wise* v. *Herzog,* 114 F. 2d 486 (C. A. D. C.), which involved an action *in personam* in the Small Claims Court, the record failed to show any service of process on the defendant or her agent, whether by registered mail or otherwise, or that notice of process came to the attention of the defendant within a reasonable time after delivery and before the return day.

no room for doubt that petitioner had ample notice of the violations charged and fully litigated them.

c. The amendment of the complaint at the hearing to expand the list of alleged discriminatees from 85 to 87 was in accord with the practice expressly approved by this Court under the original Act in *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 224-225. The transaction complained of—petitioner's refusal to reinstate unfair labor practice strikers upon their mass application—affected the entire group of 87. That two were inadvertently omitted from the charge could not, under these circumstances, preclude the Board, following its administrative investigation, from amending the complaint at the opening of the hearing to reflect the full consequences of petitioner's illegal action. The amended Act expressly preserved the Board's right to amend the complaint "at any time prior to the issuance of an order based thereon." Section 10 (b). The Board may elaborate in the original complaint, and *a fortiori,* in the amended complaint, the violations alleged in the charge. *Consumers Power Co.* v. *National Labor Relations Board,* 113 F. 2d 38, 42-43 (C. A. 6); cf. *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 368-369; *National Labor Relations Board* v. *Indiana & Michigan Electric Co.,* 318 U. S. 9, 18.[15]

---

[15] For similar holdings under the amended Act, see *National Labor Relations Board* v. *Kobritz,* 193 F. 2d 8, 14-16 (C. A.

d. Petitioner's contention that the Board's finding of an illegal lockout is not supported by allegations in the charge or the complaint is virtually identical to that rejected as "highly technical" by this Court in *National Labor Relations Board* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333, 349-351. Since the lockout grew out of and was part of the same pattern of events which formed the basis of the charge and the complaint (*supra*, pp. 6-7), and since, as the Board found (R. 148), the illegality of the lockout was fully litigated at the hearing, petitioner was clearly not prejudiced. See R. 225-226; B. A. 179-181, 193-201. Cf. *National Labor Relations Board* v. *Sunbeam Electric Mfg. Co.*, 133 F. 2d 856, 858 (C. A. 7).[16]

---

1); *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898, 903-904 (C. A. 3); *National Labor Relations Board* v. *Kingston Cake Co.*, 191 F. 2d 563, 567 (C. A. 3); *National Labor Relations Board* v. *Westex Boot & Shoe Co.*, 190 F. 2d 12, 13-14 (C. A. 5); *Cathey Lumber Co.* v. *National Labor Relations Board*, 185 F. 2d 102 (C. A. 5); enforcing 86 NLRB 157, 162, vacated on other grounds, 189 F. 2d 428; *National Labor Relations Board* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 149 (C. A. 7); *Kansas Milling Co.* v. *National Labor Relations Board*, 185 F. 2d 413, 415 (C. A. 10). The dictum in the *Superior Engraving* case, *supra*, relied on by petitioner (p. 10), concerned an amended complaint which added a new and totally unrelated unfair labor practice based upon an untimely charge.

[16] The cases cited at pp. 16-17 of the petition all involve situations where the company was not put on notice that the Board was litigating the unfair labor practice eventually found. The Board now customarily declines to find violations as to matters not alleged or litigated. *Pinkerton's Na-*

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

MOZART G. RATNER,
Assistant General Counsel,

FREDERICK U. REEL,
MAURICE ALEXANDRE,
Attorneys,

National Labor Relations Board.

MARCH, 1952.

---

tional Detective Agency, Inc., 90 NLRB 205, 206; *Service Trade Chauffeurs*, 85 NLRB 1037, 1039, n. 3. In *Joanna Cotton Mills* v. *National Labor Relations Board*, 176 F. 2d 749 (C. A. 4), cited by petitioner, p. 18, the court, after holding that the Board's finding was unsupported by the evidence, added as a dictum (p. 754) that the untimely amended charge "brought into the case a new and entirely different charge of unfair labor practice from that contained in the original charge," and hence was barred by limitations.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U.S.C. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or pre-

scribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before

a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. * * *

* * * * * *

The pertinent provisions of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. IV, 141, *et seq.*), are as follows:

* * * * * *

SEC. 9. * * *

* * * * * *

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that

he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice

occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may

be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence

on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect

to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * * *

☆ U.S. GOVERNMENT PRINTING OFFICE 1952—89:785/P.O.952

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 586

OLIN INDUSTRIES, INC.,
WINCHESTER REPEATING ARMS COMPANY DIVISION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The petition for writ of certiorari herein was denied on April 7, 1952. This petition for rehearing is timely filed.[1]

Counsel has in this instance departed from his practice of not burdening the Court with petitions for rehearing. That departure is felt to be warranted for the following reasons. First: This case presents the important federal

[1] The time for filing was extended until May 7, 1952, by order of Mr. Justice Black, entered on April 21, 1952.

question of whether a union barred from the benefits of the National Labor Relations Act, as amended, by reason of its failure to comply with the oath and reporting provisions of that law may, nevertheless, obtain such benefits by the subterfuge of having an individual "front" for the non-complying union in the filing of charges of unfair labor practices. Since the denial of certiorari in this case, the court below has announced a decision (*N.L.R.B.* v. *Happ Brothers Co.*, C.C.A. 5th, decided April 15, 1952) on that precise question which plainly shows it to be in conflict with the Court of Appeals for the Third Circuit. Second: The National Labor Relations Board presumably will, on the basis of the conflict with the Third Circuit, obtain review of the decision of the court below in *Happ Brothers Co.* This case might appropriately be considered at the same time. As matters stand, petitioner has been denied the opportunity to prove the subterfuge of a "front" used by the noncomplying union in this case, although the court below *now* holds that such a subterfuge is not permissible. And third: The Court's original consideration of the "front" question as a ground for granting certiorari may well have been prejudiced by respondent's broad but inaccurate assertion that petitioner had abandoned the question in the court below. Primarily because of these considerations, counsel respectfully prays in behalf of petitioner that the Court grant rehearing of its order denying review and permit certiorari to issue in accordance with the petition filed February 14, 1952.

Grounds of Petition.

1. Certiorari should be granted in resolution of the conflict between the court below and the Circuit Court of Appeals for the Third Circuit on whether the oath and reporting provisions of the National Labor Relations Act, as amended, may be subverted by the subterfuge of having an individual "front" for a noncomplying union.

Here the charges upon which the National Labor Relations Board proceeded were filed by a lawyer over his own signature (R. 23; 26; 30; 35). The lawyer was not connected with petitioner. The charges, however, concerned numerous members of a non-complying union who were in petitioner's employ (R. 26-28; 30-33; 35-38). Substantially the same charges had previously been filed by the union; but withdrawn in pursuance of its policy "to have nothing to do with the Taft-Hartley Law" (R. 169-170). One witness who was included in the charges against petitioner testified that his first acquaintance with the man who filed the charges was meeting him at the union hall a week or ten days before the hearing. The charges had been filed almost a year before the hearing. The witness testified further that he had never discussed this case with the man who filed the charges. At that point, the Trial Examiner cut off further inquiry on the "front" question despite an offer by petitioner to prove the "front" for the noncomplying union if permitted to continue (Appendix to Petitioner's Brief in the court below, pp. 23-27).

Section 9(f)(h) of the Act (pp. 30-31 of our petition for certiorari) plainly provides that respondent shall make no investigation of any question raised by a noncomplying union and issue no complaint pursuant to a charge made by such a union. Nevertheless, respondent on the express statement that "it is immaterial that he [the filing individual] might be acting on behalf of the union" denied petitioner the opportunity to prove the "front" (R. 143, fn. 2). The court below declined to grant petitioner leave on the "front" question to adduce additional evidence before respondent pursuant to section 10(e) of the Act (p. 32 of our petition for certiorari). That action was without opinion (R. 403). In an earlier decision, *N.L.R.B.* v. *Augusta Chemical Co.*, 187 F. 2d 63, the court below had rejected the legal contention of the respondent there that a Board order was unenforceable because charges filed in the names of individual employees were in fact filed by a

noncomplying union in a fraudulent subterfuge; and the court had done so with the flat statement: "We are in complete disagreement with respondent's position on this point." See the *Augusta Chemical Co.* case at p. 64. In a later decision after the denial to petitioner of an opportunity to prove the "front," the court below rejected the argument of the Board in reliance on *Augusta Chemical Co.* that the whole question of "fronting" was "irrelevant" and "insignificant" and "too academic to consider"; and the court refused enforcement of a Board order based on charges filed in the name of an individual but in fact for a noncomplying union. *N.L.R.B.* v. *Happ Bros. Co.*, 29 L.R.R.M. 2699 (C.C.A. 5, April 15, 1952).

The *Happ Bros.* decision was subsequent to this Court's denial of our petition. It is in direct conflict with *N.L.R.B.* v. *Clausen*, 188 F. 2d 439 (C.C.A. 3, 1951). In *Clausen*, the Court of Appeals for the Third Circuit expressly followed the *Augusta Chemical* decision of the court below in flatly rejecting the legal contention of nonenforceability of a Board order based on charges filed in the name of individuals who were in reality representing a noncomplying union.

Presumably, respondent, on the basis of the conflict with *Clausen*, will petition for review of *Happ Bros.* and also for review of *N.L.R.B.* v. *Alside Co.*, 192 F. 2d 678 (C.C.A. 6, 1951), a decision which, like *Happ Bros.*, denied enforcement of a Board order because the charges there had been filed by an individual deemed to have acted as a "front" for a noncomplying union. The time for filing respondent's petition for certiorari has not expired in either of the *Happ Bros.* and *Alside* cases. The same question of the legal effect of a "front" in behalf of a noncomplying union is urged in a recent petition for certiorari now pending before the Court. See *Southern Furniture Mfg. Co.* v. *N.L.R.B.*, Petition for Certiorari filed April 7, 1952.

If, as appears likely, the "front" question will be reviewed by the Court in the near future, it would seem harsh to deny petitioner preservation of the opportunity to benefit from the Court's review of the question, should review go against respondent.[2]

The great importance of the question here presented hardly needs emphasis. Extremely weighty considerations of national policy sustained the validity of the Taft-Hartley Act's oath and reporting provisions. *American Communications Assn.* v. *Douds,* 339 U.S. 382. Those provisions are thought to be enforceable. *N.L.R.B.* v. *Highland Park Mfg. Co.,* 341 U.S. 322. Yet they are a joke if the sham of a "front" avoids them. And underlying all is a consideration, perhaps even greater,—continuation of the present uncertain state of the law in the various circuits on the "front" question permits continuation of the policy of the respondent, an executive agency of the Government, to treat the "front" question as "irrelevant, insignificant, and too academic to consider" (See *N.L.R.B.* v. *Happ Bros. Co., supra*), despite a rather plain congressional enactment and this Court's decisions in *Douds* and *Highland Park.*

---

[2] Respondent stated in its Brief in Opposition that petitioner had "abandoned" the "front" point (Brief in Opposition, p. 13). Although respondent's statement is somewhat ambiguous, we do not understand that any express abandonment is claimed. In any event, there was none. The point was urged upon, and expressly rejected by the Trial Examiner and the Board. In view of the *Augusta Chemical* decision, the point was not urged on the court below at original hearing. However, the point was urged upon the court below with strong reliance on the intervening *Alside* case in petitioner's application for leave to adduce additional evidence on the point. That application was rejected (R. 403). Presentation to Board and Court of Appeals would suffice to preserve a point of lesser importance. All the more so here; for the "front" question goes "to the foundation of the action" (*Gila Valley, Globe & Northern Railway Co.* v. *Hall,* 232 U. S. 94, 98), "to the existence of the power on which the proceeding rests" (*Mahler* v. *Eby,* 264 U. S. 32, 45), to the power of respondent to issue any order at all. The question here is jurisdictional. *N.L.R.B.* v. *Happ Bros. Co., supra.*

2. Certiorari should be granted to resolve the federal question of general importance here presented—whether the respondent can at any time now or in the future issue a complaint with respect to an unfair labor practice alleged to have occurred years ago, provided only that the charge of unfair labor practice be filed with respondent prior to the effective date of the Taft-Hartley Law (August 22, 1947).

The charges here were filed more than six months after the alleged violations, indeed in substantial part some five years later. The complaint was issued after the effective date of the Taft-Hartley Law. So much is certain and not in dispute.[3]

Section 10(b) of the Act, as amended by the Taft-Hartley Law (See p. 31 of our petition for certiorari), expressly defines respondent's "power to issue" complaints, and in doing so expressly provides: "That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . .". In this proceeding, the complaint was issued after the effective date of section 10(b), as amended, and was based on charges filed more than six months after the alleged unfair labor practices. Such a complaint was literally and plainly barred by section 10(b).

But the respondent, the court below, and other circuit courts of appeal read the statutory language "no complaint shall issue" as imposing only a statute of limitation upon the filing of charges. On that basis the Fourth and Fifth Circuits[4] say that a complaint may issue at any time after the effective date of section 10(b) based on a *charge filed within six months of such effective date*, no matter

---

[3] Alleged violations occurred in 1942 and in October, 1946; charge was filed July 30, 1947, and amended August 4, 6, and 18, 1947, (R. 24-38); complaint issued April 8, 1948 (R. 43), and was amended at the hearing (R. 163).

[4] *Joanna Cotton Mills* v. *N.L.R.B.*, 176 F. 2d 749 (C.C.A. 4, 1949); *N.L.R.B.* v. *Itasca Cotton Mfg. Co.*, 179 F. 2d 504 (C.C.A. 5, 1950).

how long before the charge the alleged violations occurred; and the Seventh Circuit[5] says, in a minor variation, that a complaint may issue at any time after the effective date of section 10(b) based on a *charge filed up to such effective date*, no matter how long before the charge the alleged violations occurred.

The variation between the Seventh Circuit and the Fourth and Fifth Circuits is, in our view, upon a false issue. The real issue is the issue squarely presented in this case—whether section 10(b) describes the kind of complaint that may not be issued after the effective date of that section, namely, a complaint based upon charges filed more than six months after the occurrence of the violations charged. The court below in deciding that real issue against petitioner, and the Fourth and Seventh Circuits in pretermitting that issue, with all deference to those courts, are rather clearly wrong. Note in this connection that the only exception in section 10(b) to the prohibition "no complaint shall issue" etc. is an inapplicable one in favor of a complainant in the armed forces; and observe that sections 102, 103, and 104 of the Act which collect all the postponements of the effectiveness of various provisions in the Act provide no such postponement for section 10(b) as respondent claims. And it is no answer to our view of section 10(b) to offer the charming irrelevance (See Brief in Opposition, p. 18, fn. 13) that Congress did not adopt a provision requiring complaints to be issued within six months after filing of charges. Congress did adopt a provision, section 10(b), requiring complaints to be based on charges filed within six months of the occurrence of the violations charged.

In view of the trend of the decisions, the false issue, on which we say the Board and the courts have wandered astray, can be reviewed on a conflict; the real issue is not likely to present a conflict of decisions for it goes unrecog-

[5] *Superior Engraving Co.* v. *N. L. R. B.*, 183 F. 2d 783 (C.C.A. 7, 1950), cert. den. 340 U.S. 930.

nized. We respectfully suggest that the public policies against litigation of stale claims and in favor of following the plain meaning of congressional enactments warrant review here of a Board doctrine which is broadly opposed to those policies, and of dubious validity, at best.

Conclusion.

For the foregoing reasons it is respectfully urged that rehearing be granted and that, for the reasons set forth herein and in the petition for certiorari, upon such rehearing a writ of certiorari issue to the Fifth Circuit Court of Appeals in accordance with the petition filed herein on February 14, 1952.

Respectfully submitted,

JOSEPH A. FANELLI
Counsel for Petitioner
Washington, D. C.

Of Counsel:
BENJAMIN E. GORDON
MAURICE EPSTEIN
ALLAN SESERMAN
SAMUEL LEITER,
Boston, Massachusetts

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

JOSEPH A. FANELLI
Counsel for Petitioner

Washington, D. C.
May, 1952.